

1/29/02

THIS DISPOSITION IS
NOT CITABLE AS
PRECEDENT OF THE
TTAB

Paper No. 13 & 16
DEB

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re The Dayton Power and Light Company

Serial Nos. 75/514,898 and 75/514,899

B. Joseph Schaeff of Killworth Gottman Hagan & Schaeff,
L.L.P. for The Dayton Power and Light Company.

James T. Griffin, Trademark Examining Attorney, Law Office
103 (Michael Hamilton, Managing Attorney).

Before Hohein, Bucher and Drost, Administrative Trademark
Judges.

Opinion by Bucher, Administrative Trademark Judge:

The Dayton Power and Light Company has filed two
applications to register the service marks DPL ENERGY
WAY TO GO and design, as shown below,¹ and DPL ENERGY,²
both for the "distribution and transmission of energy"
in International Class 39:

¹ Serial No. 75/514,898, filed on July 7, 1998, based upon a
bona fide intention to use the mark in commerce. The word ENERGY
has been disclaimed apart from the mark as shown.

² Serial No. 75/514,899, filed on July 7, 1998, based upon a
bona fide intention to use the mark in commerce. The word ENERGY
has been disclaimed apart from the mark as shown.



Registration has been finally refused under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that applicant's marks, when applied to its services, so resemble the mark D P & L, which is registered for "public utility services - namely, supplying electricity, gas and steam,"³ as to be likely to cause confusion, to cause mistake or to deceive.

Applicant has appealed. Briefs have been filed, but applicant did not request an oral hearing. We affirm the refusal to register.

In the course of rendering this decision, we have followed the guidance of In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 1362, 177 USPQ 563, 567-68 (CCPA 1973), which sets forth the factors that should be considered, if relevant, in determining likelihood of confusion. In any likelihood of confusion analysis, two key considerations

³ Reg. No. 1,253,246, issued on October 4, 1983; Section 8 affidavit filed and Section 15 affidavit acknowledged. This registration, owned by Delmarva Power & light Company, is limited to the area comprising the states of Delaware, Maryland and Virginia, pursuant to Concurrent Use Proceeding No. 500.

are the similarities between the marks and the similarities between the goods. Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

Turning first to a consideration of the respective services, we agree with the Trademark Examining Attorney that the services herein are essentially identical. Both registrant and applicant are utility companies supplying energy to their respective customers. Applicant does not argue to the contrary.

We turn next to examine the similarities and dissimilarities in the marks at issue when considered in their entireties, bearing in mind that "[w]hen marks would appear on virtually identical goods or services, the degree of similarity [of the marks] necessary to support a conclusion of likely confusion declines." Century 21 Real Estate Corp. v. Century Life of America, 970 F.2d 874, 23 USPQ2d 1698, 1701 (Fed. Cir. 1992), cert. denied, 506 U.S. 1034 (1994).

While we have considered applicant's marks in their entireties, we also agree with the Trademark Examining Attorney that the dominant portion of applicant's two service marks, as applied for herein, is the designation DPL. Inasmuch as registrant's mark

is the letters D P & L, the respective marks all have the identical, upper-case letters "D," "P" and "L" in exactly the same order. The degree of spacing between the letters represents a *de minimis* difference in appearance, and the presence or absence of an ampersand is such a slight difference in sound that the average utility customer will not regard it as significant. To the extent a string of letters carries any meaning, the letters of these marks have quite similar connotations as both applicant and registrant have trade names that include the words "Power and Light," describing the kind of business in which they are both engaged.

Based upon the identical nature of the services and the similarities in overall commercial impression of the marks, this would seem to be a straightforward case for finding likelihood of confusion. However, applicant has claimed ownership of several extant federal registrations incorporating the letters "DP&L." Accordingly, applicant argues that inasmuch as these registrations have co-existed on the Principal Register with the cited registration, the current application should also be permitted to co-exist with registrant's cited registration.

While applicant is clearly the owner of a prior registration for the mark DP&L as shown below:



for "public utility services - namely, supplying electricity, gas and steam," this registration is geographically limited to Ohio, Kentucky, Indiana, Michigan and Tennessee,⁴ as was correctly noted by the Trademark Examining Attorney. The current application is not in any way geographically limited and would thus include the states listed in the cited registration.

Applicant has also claimed ownership of two other territorially unrestricted federal trademark registrations for the mark shown below:

⁴ Reg. No. 1,124,593 (issued on August 28, 1979, Section 8 affidavit filed and Section 15 affidavit acknowledged, renewed) is geographically limited, also pursuant to Concurrent Use Proceeding No. 500.



for "public utility services,"⁵ and for the mark DP&L'S RELIABILITY PLUS, also for "public utility services."⁶

We begin this part of our analysis by noting that in both of these existing registrations, the DP&L portions of the marks are much less prominent relative to the entire composite mark than is the case with the terms DPL/DP&L in applicant's two applied-for marks and the cited mark owned by registrant.

Furthermore, as we have often stated, each case must be decided on its own merits. The allowance of another mark by another Trademark Examining Attorney, regardless of the similarity of the mark to applicant's currently applied-for marks, is not binding on the Board. We do not have the file histories from Reg. Nos. 1,761,740 and 2,356,503 before us. Moreover, even if we did have these files, we would not be required to permit the registration

⁵ Reg. No. 1,761,740, issued on March 30, 1993; Section 8 affidavit filed and Section 15 affidavit acknowledged.

⁶ Reg. No. 2,356,503, issued on June 13, 2000.

of yet another mark which we find likely to cause confusion with a previously registered mark. See In re National Novice Hockey League, Inc., 222 USPQ 638 (TTAB 1984) and the cases cited therein.

Applicant is correct in noting that as the owner of these registered marks, applicant enjoys the benefit of its certificates as *prima facie* evidence of the validity of the registrations, its ownership of the composite marks, and its exclusive right to use the marks in commerce in connection with the services specified in the certificates. 15 U.S.C. 1057(b). However, given the differences between applicant's two unrestricted, registered marks and its two applied-for marks, the fact that applicant was issued service mark registrations for its two earlier marks despite the existence on the Principal Register of the mark cited herein is largely immaterial to the instant determination.

Decision: The refusal to register is affirmed.